No. 15-274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* CATHOLICVOTE.ORG LEGAL DEFENSE FUND AND UNIVERSITY OF ST. THOMAS PROLIFE CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amicus CatholicVote.org Legal Defense Fund participates in litigation that furthers CatholicVote.org's mission of building a culture that respects the sanctity of life, religious liberty, marriage, and the family. Members of CatholicVote.org seek to promote an authentic understanding of ordered liberty and the common good in light of the Roman Catholic religious tradition, and maintain that our Constitution's commitment to democratic self-government requires that the will of the people be respected where it is fully consistent with the natural law, as is the case here. Members of CatholicVote.org believe that the people, acting through their elected representatives, have a moral obligation to enact legislation designed to protect the life and health of both mother and child as well as protect the fundamental relationship between mother and child to the full extent allowed by the Constitution.

Amicus University of St. Thomas Prolife Center was established to promote effective legal protection for all human life, from the moment of fertilization to natural death. Situated in a Catholic University, the Center exists to identify, study, and overcome constitutional, regulatory, and cultural barriers to creating what Pope John Paul II called a "Culture of Life." The Prolife Center provides support for scholarship and education on reproductive health and end-of-life issues. Faculty and students from

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1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief, and no one other than the amici curiae, their members, or their counsel financed the preparation or submission of this brief.

the Center regularly assist in drafting, passing, and defending laws to protect and promote human life.

Amici believe that the Texas abortion regulations at issue in this case are constitutional under the undue burden standard as formulated and applied in this Court's controlling precedents. The purpose of this brief is to provide a careful explication of the undue burden standard and to explain why this Court should reject petitioners' heightened-scrutiny transformation of that standard.

SUMMARY OF ARGUMENT

The overarching legal issue in this case is "What type of scrutiny should a court employ in applying the 'undue burden standard' adopted by a controlling plurality of this Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)?" As this Court said in *Gonzales v Carhart*, 550 U.S. 124, 146 (2007), "*Casey* struck a balance" of which the undue burden standard is an integral part. Under that standard, a pre-viability abortion regulation is unconstitutional if its purpose or effect is to place "a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. Petitioners and their amici seek to tilt that standard against state regulation of abortion by recasting its "purpose" prong as an exacting form of heightened scrutiny, and its "effect" prong as an open-ended balancing of the extent to which a regulation advances a valid state interest against the extent of its burdensome effects on women's access to abortions. This Court should reject petitioners' invitation. Under the governing precedents, the challenged provisions of the Texas statute withstand facial attack: the legislature had "a rational basis,"

Gonzales, 550 U.S. at 158, for concluding that HB2's requirements would further the state's legitimate interest in improving women's health by making abortions safer; and petitioners have failed to show that whatever increased expenses or difficulties some Texas women may encounter in obtaining abortions rise to the level of a "substantial obstacle." In the context of the undue burden standard, heightened scrutiny of legislative purposes is inappropriate because regulations whose effects do not create a "substantial obstacle" to abortion access should enjoy the same presumption of constitutionality as ordinary social and economic legislation. Similarly, to transform the "substantial obstacle" inquiry into a balancing test would jeopardize the state's ability to enact legislation to protect fetal life and maternal health, by empowering trial courts to strike down any regulation whose tendency to advance state interests is — in their varying and value-laden judgments — deserving of less weight than whatever burdens the regulation may impose on access to abortion.

ARGUMENT

Since *Casey*, the Justices of this Court have on occasion differed with regard to the meaning and proper application of the undue burden standard. According to the dissent in *Gonzales*, the undue-burden standard calls for "close scrutiny" of "state-decreed limitations on a woman's reproductive choices." 550 U.S. at 171 (Ginsburg, J., dissenting). The *Gonzales* Court disagreed: "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power in furtherance of its legitimate interests in regulating the medical profession " 550 U.S. at 158. The differences

between these approaches, while difficult to capture in a single phrase, are real and substantial.

Petitioners refuse to accept that this Court meant what it said (and did) in *Casey* and *Gonzales*. They argue that the undue burden standard requires reviewing courts to engage in a skeptical, in-depth inquiry into the legislature's purpose, Pet. Br. 35-40, as well as a comparative evaluation of the extent to which a regulation burdens women's access to abortion against the extent to which it advances the state's legitimate regulatory objectives. *Id.* at 44-48. Amici do not contend that the undue burden standard is simply equivalent to rational-basis review. But petitioners' argument hinges on a false dichotomy. That the undue burden standard does not consist solely of rational basis review in no way implies that it calls for the exacting scrutiny petitioners would have this Court employ. The undue burden standard *incorporates* rational-basis review into its purpose prong, while also requiring that abortion regulations not have the effect of creating a substantial obstacle to women's access to abortion. A substantial obstacle is one that severely obstructs women's ability to obtain abortions, not any obstacle whose burdens on women are somehow deemed to outweigh the extent to which it advances a legitimate state interest.

I. *Casey*'s Undue Burden Standard Subjects Abortion Regulations To Rational-Basis Review of Their Purposes, And Does Not Balance Regulatory Benefits And Burdens In Determining Whether A Regulation's Effects Create A Substantial Obstacle To Women's Access to Abortion

A. *The Origins Of* Casey's *Undue Burden Standard Illuminate Its Core Features.*

To understand the type of scrutiny required by *Casey*'s undue burden standard, it is necessary to begin with its predecessor: the "unduly burdensome test" that Justice O'Connor advocated in her dissent in *City of Akron v Akron Center for Reproductive Health, Inc.* (*"Akron I"*), 462 U.S. 416, 452 (O'Connor, J., dissenting). Justice O'Connor's "unduly burdensome test" had three key features: (1) it was a threshold test for determining whether strict scrutiny rather than rational-basis scrutiny applies;[2] (2) it focused solely on the challenged regulation's *effects* on the cost and availability of abortions;[3] and (3) it required a severe impediment to abortion access to trigger strict scrutiny.[4] Under her approach, "[i]f the impact

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2. 462 U.S. at 463 (O'Connor, J., dissenting) ("[t]he "undue burden" required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard").

3. *Id.* at 462 (the undue burden inquiry is concerned with whether "the impact of the regulation rise[s] to the level appropriate for our strict scrutiny").

4. *Id.* at 464 (arguing that the Court's post-*Roe* decisions had generally found "an 'undue burden' . . . in situations involving absolute obstacles or severe limitations on the abortion decision").

of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate state purposes.'" *Id.* at 462. On the other hand, even if a regulation *did* impose an undue burden, Justice O'Connor argued that it could be constitutional if "validated by a sufficiently compelling state interest." *Id.* at 463 (citation omitted). *In that limited strict-scrutiny context*, she balanced the state's interest against the burden on abortion rights. *See id.* at 474 (even if Akron's waiting period imposes an undue burden, it is "a small cost to impose to ensure that the woman's decision is well-considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own"). By contrast, she flatly ruled out balancing in applying the threshold unduly burdensome test. *Id.* at 465 n.10 ("it is not appropriate to *weigh* the state interests at the threshold stage") (emphasis in original).

In the years prior to *Casey*, this Court was divided among Justices who argued that abortion regulations should receive strict scrutiny, Justices who argued that they should receive rational-basis scrutiny, and Justice O'Connor, who adhered to the undue burden test she proposed in *Akron I*.[5] In *Casey*, after carefully parsing this Court's decisions, the Third Circuit concluded that fidelity to precedent could be achieved "only by applying the undue burden standard of review, that is, only by applying strict scrutiny review to regulations that impose an undue burden and rational basis review to those which do not." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 697 (3rd Cir. 1991).

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5. *See Webster v Reproductive Health Services*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Although the joint opinion in *Casey* affirmed the Third Circuit's rulings on each challenged regulation, it "refine[d] the undue burden analysis in accordance with the principles articulated [herein]." 505 U.S. at 879. Unlike Justice O'Connor's earlier version, *Casey*'s undue burden standard is not a threshold inquiry that determines which level of scrutiny applies to an abortion regulation. Instead, *Casey*'s undue burden standard *constitutes* the requisite type of scrutiny: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. Conversely, a law that complies with both prongs of the undue burden standard must "be considered a permissible means of serving its legitimate ends," *id.* at 877, and is therefore constitutional. Consequently, "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 878.

In light of this history, we turn to the crucial questions this case raises about the meaning of *Casey*'s undue burden standard: (1) in applying the purpose prong, what type of scrutiny should a court employ?; and (2) in applying the effect prong, should a court balance the extent to which the regulation advances the state's valid interest against the extent of its burdensome effects on women's access to elective abortions, or should it simply ask whether the regulation creates a "substantial obstacle" to abortion access?

B. Casey's *Formulations Imply That The Purpose Prong Employs Rational-Basis Review, And* Gonzales *Confirms That Conclusion*

Casey did not specify what level of scrutiny reviewing courts should use in evaluating challenges to abortion regulations under the purpose prong. *Casey*'s explication of that prong, however, is most consistent with rational-basis review.

Under Justice O'Connor's original "unduly burdensome test" an abortion regulation could be found unconstitutional in one of two ways: (1) if it had the effect of imposing an undue burden, and failed to pass strict scrutiny; or (2) if it did *not* have the effect of imposing an undue burden, but failed to pass rational-basis scrutiny. Under *Casey*, the former (and far more exacting) inquiry into purpose becomes irrelevant — because if the law has the effect of imposing an undue burden, it is unconstitutional without more. Consequently, the purpose prong is outcome-determinative only when a law does *not* have the effect of imposing an undue burden. For good reason, *Casey* adhered to Justice O'Connor's *Akron I* approach to a law of this kind: precisely because it does not create a substantial obstacle to women's access to abortions, it should be evaluated using the deferential rational-basis test.

Casey's formulations are most consistent with this interpretation. The joint opinion declares:

> Unless it has [an unduly burdensome] effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.

> Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden. 505 U.S. at 878.

Read in its entirety, this passage indicates that a regulation "designed to foster the health of a woman seeking an abortion" satisfies the purpose prong if it is "reasonably related to that goal." That language ordinarily signals that the Court is engaging in rational-basis review.[6] *Casey* also indicates that the purpose prong should focus on whether the state has *a* valid purpose, rather than attempting to determine whether that purpose is primary, as heightened scrutiny would presumably require. *See* 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it"). *See also id.* at 901 (concluding that a recordkeeping regulation does not violate the purpose prong because "it cannot be said that the requirements serve no purpose other than to make abortions more difficult").

Most importantly, this Court's subsequent decision in *Gonzales* confirms that the purpose prong entails

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6. See, e.g., *Astrue v Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (upholding legislation "[u]nder rational-basis review" because it was "'reasonably related to the government's interests") (citation omitted); *Casey*, 505 U.S. at 974 (Rehnquist, C.J., dissenting) (examining "whether the spousal notification requirement rationally furthers any legitimate state interests," and concluding that "[t]he State itself has legitimate interests . . and the spousal notification requirement is reasonably related to advancing those state interests.")

rational-basis review. Applying *Casey*'s purpose prong, *Gonzales* stated:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn. 550 U.S. at 158.[7]

As this statement shows, the *purpose* prong of the undue burden standard calls for rational-basis review, while the effect prong operates as an independent requirement that abortion regulations must also satisfy.[8] Under rational-basis scrutiny, this Court has held, a regulation

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7. In *Gonzales*, Justice Ginsburg objected that "[i]nstead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act." 550 U.S. at 187 (Ginsburg, J., dissenting). Although amici respectfully suggest that Justice Ginsburg erred in suggesting that *Casey*'s undue burden standard requires more than "a 'rational' ground" to satisfy the purpose prong, she correctly discerned that the *Gonzales* Court rejected "heightened scrutiny" in favor of rational-basis review with respect to the purpose prong.

8. Insofar as the court below treated the rational basis inquiry as a separate requirement in addition to the two-pronged undue burden standard, see Pet. App. 42a-43a, we believe it misunderstood this Court's precedents. A law that is reasonably related to a legitimate state purpose, and that does not impose a substantial obstacle on women's access to abortion, necessarily survives rational-basis review. Because the court below correctly applied the undue burden standard, however, any error in this regard was harmless (and would have been prejudicial to respondent, not petitioners).

must be upheld if "there is any reasonably conceivable state of facts that could provide a rational basis" for it; the "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"; and the burden is on those challenging a regulation "to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320-321 (1993) (describing rational-basis review in equal protection analysis) (internal citations omitted).[9] This conclusion does not mean, as petitioners imply, that rational basis review requires the "blind deference to the legislature" they attribute to the court below in this case. Pet. Br. at 47. It does, however, rule out the skeptical, exacting scrutiny that the District Court employed and that petitioners would have this Court endorse.

C. *The Effect Prong Asks Whether A Regulation Creates A Substantial Obstacle, Without Regard To Balancing Its Benefits And Burdens*

Petitioners contend that "[t]o withstand review under the effects prong, the restriction must advance the state's interest to an extent sufficient to warrant the obstacles it imposes on women seeking abortion." Pet. Br. 34. If accepted, this interpretation of the effects prong would require the reviewing court to balance the extent to which a regulation advances the state's interest against the magnitude of its burdensome effects. Variants of this balancing approach to the effects prong of the undue burden standard have been adopted by the Seventh

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9. The same highly deferential standard applies in due process analysis. *See Washington v Glucksberg*, 521 U.S. 702, 728 (1997).

Circuit, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015), and by the District Court in this case. See Pet. App. 145a. *Casey* and *Gonzales* are to the contrary. As explained below, interest-balancing played an important – but limited – part in the *Casey* joint opinion's reaffirmation of *Roe*'s "essential holding," but is irrelevant in applying the effect prong. And rightly so. As Part IV will argue, to inject balancing into the effect prong would imperil the balance *Casey* struck between the state's profound interest in protecting pre-viable fetuses and the woman's protected liberty interest in an elective abortion.

The joint opinion in *Casey* abandoned *Roe*'s treatment of elective abortion as a fundamental right that can be overridden only by a compelling state interest. *Roe v. Wade*, 410 U.S. 113, 151-156 (1973). Instead, *Casey* grounded the right to pre-viability elective abortion in a categorical interest-balancing judgment – derived from *Roe*, and reaffirmed in *Casey* on stare decisis grounds – that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." 505 U.S. at 846. As that holding expressly indicates, states may neither prohibit pre-viability abortions outright, nor *indirectly* prohibit them by creating "substantial obstacle[s]" to women's access to elective abortions.

The controlling *Casey* opinion also, however, rejected the strict scrutiny post-*Roe* cases had employed in favor of the "undue burden" test, on the ground that *Roe* and later cases had "undervalue[d] the State's interest in the potential life within the woman." 505 U.S. at 875. In

explaining why it chose the undue burden standard, *Casey* relied on the comparative weights of the conflicting state and individual interests:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. *Id.* at 876.

The undue burden standard itself, however, is *not* a balancing test. Its purpose is to identify and interdict "abortion regulations which deprive[] women of the ultimate decision," or are intended to do so. *Casey*, 505 U.S. at 875. No matter how much it advances a legitimate state interest, a regulation is deemed unconstitutional if it creates – or is intended to create – "a substantial obstacle" to women's access to elective abortions. *See id.* at 877 ("a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" cannot "be constitutional"). Rather than calling for balancing, the undue burden test sets up two requirements all abortion regulations must meet; and neither of those requirements – the "purpose" prong or the "effect" prong — involves balancing. Accord, Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 Colum. L. Rev. 2025, 2034 (1994) ("An abortion regulation that is found to impose a burden amounting to a substantial obstacle

is unconstitutional, regardless of the benefits it also may bring; correspondingly, a regulation that is found not to impose a substantial obstacle is upheld no matter how few benefits it brings, provided it is rational").

In order for a regulation to satisfy the effect prong, its regulatory effects must not "plac[e] a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. On its face, that standard simply calls for an assessment of the regulation's effects and a judgment about the extent and magnitude of any resulting impediment to women seeking abortions. To avoid this conclusion, petitioners argue that "[o]nly by considering the strength of a state's interest can a court determine whether a restriction is 'undue' or 'unwarranted.'" Pet. Br. at 32. This appeal to *Casey*'s use of the words "undue" and "unwarranted" is unavailing. Although the word "undue" *can* refer to a judgment based on balancing, it obviously is not limited to such judgments. The dictionary meanings of "undue" include "not just; not lawful; not legal," "improper; not appropriate or suitable," and "erring by excess; excessive; unreasonable." Webster's New Twentieth Century Dictionary 1995 (2d ed. 1979). Because justice, legality, propriety, and reasonableness are not merely different names for "balancing costs and benefits," it should be apparent that *none* of these meanings presupposes or denotes balancing.[10] Beyond

10. The same is true of "unwarranted," which simply means "not justified." Random House Webster's College Dictionary 1435 (2000). *Casey* does use "unwarranted" to refer to the interest-balancing that impelled the plurality to *adopt* the undue burden standard, *see* 505 U.S. at 876, but *Casey*'s explication of the undue burden standard itself pointedly refers only to "undue" burdens, not "unwarranted" ones. *See id.* at 877-879.

that, as Justice O'Connor's use of the phrase "unduly burdensome test" in *Akron I* suggests, the primary meaning of "undue" in the undue burden standard is simply "excessive."[11] Under *Casey*, an "obstacle" is excessive, and thus amounts to an undue burden, if it is "substantial" — *and whether an obstacle is "substantial" does not depend on balancing.*

Proponents of the balancing approach rely heavily on *Casey*'s statement that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Specifically, petitioners claim that a law that "regulates abortion for the purpose of promoting women's health" is deemed an "[u]necessary health regulation" – and is therefore unconstitutional under the effect prong — unless "any obstacle it imposes on women seeking abortion [is] warranted by the health benefits of the law." Pet. Br. at 45. According to petitioners, then, the quoted statement from *Casey* actually means the following: "Health regulations that have the purpose or effect of presenting a substantial obstacle impose an undue burden, and whether they have that purpose or effect turns on whether or not they are necessary, which in turn entails balancing their health benefits, if any, against their burdensome effects on women seeking abortion." This interpretation is utterly implausible. If the *Casey* Court had intended to transform the effect prong of the undue burden standard into a balancing test, it would

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11. *See also Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (describing the undue burden standard as turning on "whether [a] limitation upon abortion is 'undue' – i.e., goes too far").

not have done so by adding an ambiguous adjective to a sentence that applies *only* to health regulations (and not to the fetal-protective regulations with which *Casey* was centrally concerned).

What then *does Casey*'s elliptical sentence mean? The literal and most natural reading is "Health regulations impose an undue burden only if they both (a) have the purpose or effect of presenting a substantial obstacle, *and* (b) are unnecessary." If this is what *Casey* intended, "unnecessary" health regulations presumably refers to a narrow category of health regulations that are strictly necessary to avoid serious danger to women's lives and health, and are therefore constitutional *even if* they create a substantial obstacle to abortion access.[12] The run of health regulations, by contrast, are intended to reduce the statistically small risks of serious complications from abortions, and remain subject to the undue burden test. In neither category is balancing called for.

Alternatively, the sentence might be read more idiomatically: "Regulations that have the purpose or effect of presenting a substantial obstacle impose an undue burden, and are *ipso facto* unnecessary (as in 'not needful' or 'unjustified')." On that reading, the word "unnecessary" merely serves to remind the reader that regulations which fail the undue burden standard are unnecessary – indeed, unconstitutional. In this case, the Court need not decide which of these two plausible readings of *Casey*'s

12. For example, consider a statute prohibiting elective abortions in the rare cases in which continued pregnancy would be safe for the woman, while an abortion would gravely endanger her life or health.

pronouncement is correct. Under either interpretation, the effect prong of the undue burden standard turns on the existence *vel non* of a "substantial obstacle," not on balancing the regulation's benefits against its burdens.

II. This Court's Applications Of The Undue Burden Standard In *Casey*, *Mazurek*, And *Gonzales* Confirm That The Purpose Prong Employs A Rational-Basis Test, And The Effect Prong Focuses On The Magnitude Of The Burdens On Women's Access To Abortion, Not On Balancing Those Burdens Against The Extent To Which The Regulation Advances A Valid State Interest

A. Casey*'s Applications Of The Undue Burden Standard*

The *Casey* joint opinion applied the undue burden standard to five provisions of the Pennsylvania statute, and upheld all but the spousal notice provision. 505 U.S. at 879-901. Because they shed the most light on the meaning of the undue burden standard, we address *Casey's* evaluations of the informed-consent requirements, the spousal notice provision, and the reporting and recordkeeping requirements. Petitioners' exacting version of the undue burden standard is nowhere to be found in the *Casey* Court's appraisal of these regulations. Its assessment of each regulation's purpose gave substantial deference to the legislature's declared purposes, drew common-sense inferences from the provision's design, and required only that there be a rational basis for concluding that it might further a legitimate state interest. Similarly, *Casey*'s assessment of each regulation's effects focused solely on the extent of any burdens on women's access to

abortions, rather than somehow balancing those burdens against the extent to which the regulation advanced a valid state interest. Had the *Casey* Court employed petitioners' heightened-scrutiny version of the undue burden standard to the record before it, the Court would likely have invalidated provisions it in fact upheld.

1. The Informed Consent Requirement

Pennsylvania's informed consent provisions required that a physician inform the woman of the nature of the procedure, relevant health risks, and fetal gestational age at least 24 hours before performing an abortion. 505 U.S. at 881. In addition, the woman was required to be informed by a qualified person of the availability of state-provided printed materials "describing the fetus" and providing information about pre- and post-natal support and assistance. *Id.* *Casey* considered and rejected challenges (1) to the contents of the required information and the optional printed materials; (2) to the mandate that the required information be conveyed by the physician; and (3) to the 24-hour waiting period. *Id.* at 881-887.

In rejecting the first challenge, *Casey* determined that providing this "truthful, nonmisleading information" advanced the state's "legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. at 882. The purpose prong was satisfied because the provision's design supported a reasonable inference that it would reduce risks of injury to women's psychological health. Similarly, *Casey* determined that the requirement that the woman be informed of optional materials about fetal development

and post-natal assistance was "a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." *Id.* at 883. Had the Court applied heightened scrutiny, it would instead have required proof that the informed-consent disclosures would prevent psychological harm to a significant number of women who proceeded with their abortions, and that the optional materials would induce a significant number of women to forego abortions.

Overruling *Akron I*'s contrary holding, *Casey* upheld Pennsylvania's requirement that a physician, rather than a qualified assistant, provide the woman with the information necessary for informed consent. 505 U.S. at 884-885. The Court was undoubtedly aware that placing this demand on the physician's time would increase the cost and reduce the availability of abortions. Nevertheless, it found that the effect prong was satisfied because the record did not suggest that the physician-only provision "would amount in practical terms to a *substantial* obstacle to a woman seeking an abortion." 505 U.S. at 884. It did so without balancing the requirement's increased costs against the extent to which the woman's choice would be better informed because she received the information from a physician.

Turning to the purpose prong, *Casey* invoked this Court's rational-basis decision in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), for the proposition that "the Constitution gives the states broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Casey*, 505 U.S. at 885.

Clearly, the Court recognized the *possibility* that the real purpose of the physician-only requirement was to increase the costs of abortion. Yet rather than remanding for trial on that issue – let alone inferring that the state's purpose was pretextual — the Court held that the requirement was "a reasonable means to ensure that the woman's consent is informed." *Id.* at 885.

The *Casey* Court inferred from the informed-consent provision's overall design that the 24-hour waiting period was reasonably related to Pennsylvania's interest in protecting fetal life: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." 505 U.S. at 885. Had the Court been employing heightened scrutiny, it would have required evidence that a 24-hour waiting period would change more minds than a shorter and less burdensome one. The Court found the question closer as to the effect prong, in light of the District Court's findings that the waiting period had "the effect of 'increasing the cost and risk of delay of abortions'" and that "the practical effect will often be a delay of much more than a day." *Id.* at 885-886. Nevertheless, focusing solely on whether the burden on women for whom the waiting period would be most onerous would amount to "a substantial obstacle," *id.* at 886-887, the Court upheld the waiting period on the record before it. It made no attempt to balance those burdens against the extent to which the statute would save fetal lives by persuading women to change their minds during the 24-hour waiting period.

2. *The Spousal Notification Requirement*

The *Casey* Court invalidated Pennsylvania's spousal consent requirement on the ground that "the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." 505 U.S. at 893-894. The Court's finding of a "substantial obstacle" rested entirely on these deterrent effects, rather than on a comparative judgment measuring them against the extent to which the provision furthered a legitimate state interest.

H .ving found the spousal notification provision to be "an undue burden, and therefore invalid," 505 U.S. at 895, the *Casey* Court also held it unconstitutional on the independent ground that it conflicted with the Court's prior decision in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976). As *Casey* explained, *Danforth* struck down a spousal consent requirement because, before birth, "the father's interest in the welfare of the child" was clearly outweighed by "the mother's interest." 505 U.S. at 895. The *Casey* Court determined that "the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*," *id.* at 897, and accordingly held it unconstitutional. Because it is not an application of the undue burden standard, *Casey*'s reliance on *Danforth*'s comparative evaluation of maternal and paternal interests lends no support to petitioners' claim that the effect prong requires balancing an abortion regulation's benefits to the state against its burdens on women's access to abortion.

3. The Recordkeeping And Reporting Requirements

Because the Pennsylvania statute's recordkeeping and reporting requirements were justified solely on maternal health grounds, the *Casey* Court's disposition of them is particularly relevant here. It aptly illustrates the difference between the Court's deferential use of the "reasonably related" purpose prong and the stricter scrutiny petitioners claim it entails. *Casey* found that the purpose prong was satisfied because the information being collected was "a vital element of medical research." 505 U.S. at 900. Had it employed heightened scrutiny, the Court would have required proof that the information required to be collected would in fact be used by medical researchers, and could lead to improvements in women's health.[13] Without balancing potential health benefits against the likely increase in abortion costs, the Court found that the effect prong was satisfied because the requirements would at most "increase the costs of some abortions by a slight amount," and thus did not "impose a substantial obstacle to a woman's choice." *Id.* at 901.

In sum, *Casey*'s applications of the undue burden standard demonstrate (1) that the purpose prong requires only that the state have a rational basis for its abortion regulations, and (2) that the effect prong asks only whether

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13. Justice Blackmun, who applied strict scrutiny to the reporting requirements, *see* 505 U.S. at 926 (Blackmun, J., dissenting in part), argued that some of them were unconstitutional because the state failed to prove that they "add[ed] to the pool of scientific knowledge concerning abortion" or were "reasonably related to the Commonwealth's interest in maternal health." *Id.* at 939.

a regulation creates a "substantial obstacle," rather than balancing the extent to which the regulation advances a legitimate state interest against the degree to which it burdens women's access to abortion. This Court's subsequent decisions, culminating in *Gonzales*, strongly support these conclusions.

B. Mazurek*'s Application Of The Undue Burden Standard*

This Court's decision in *Mazurek v Armstrong*, 520 U.S. 968 (1997) (per curiam), confirms that the purpose prong calls for a rational-basis inquiry that gives substantial deference to legislative judgments. In upholding a statute permitting only physicians to perform abortions, the *Mazurek* Court reiterated that "[w]e do not assume unconstitutional legislative intent even when statutes produce harmful results," and specifically *rejected* an inference that "the law must have had an invalid purpose because 'all health evidence contradicts the claim that there is any health basis' for the law." 520 U.S. at 972-973. Both points are important here. Petitioners' case against HB2 under the purpose prong rests primarily on an inference from its allegedly minimal maternal-health benefits, coupled with another inference from its allegedly burdensome effects. *See* Pet. Br. 36-41. Assuming arguendo the truth of petitioners' allegations, *Mazurek* makes clear that neither inference suffices to overcome the contrary conclusion from the law's design and the benefits it can rationally be anticipated to provide: that it is reasonably related to the state's important interest in increasing women's health.

C. Gonzales' *Application of the Undue Burden Standard*

This Court's opinion in *Gonzales* "accepted as controlling," and faithfully applied, *Casey*'s undue burden test to a facial challenge to the federal statute banning partial-birth abortions. 550 U.S. at 156. In so doing, the Court employed rational-basis review under the purpose prong, and inquired into the existence of "significant health risks" under the effect prong without balancing.[14]

The *Gonzales* Court began by examining Congress's stated purposes, which included promoting respect for human life, born and unborn. 550 U.S. at 157. It then asked whether the "ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives." *Id.* at 158. The Court acknowledged that the most commonly used second-trimester abortion method (dismemberment *in utero*) was also "laden with the power to devalue human life." *Id.* Indeed, the dissenting Justices thought it was "simply irrational" to believe that "either of these two equally gruesome procedures" was "more akin to infanticide than the other." 550 U.S. at 182 (Ginsburg, J., dissenting) (quoting *Stenberg*, 530 U.S. at 946-947 (Stevens, J., concurring)). Although the *Gonzales* Court disagreed with that assessment, it did not dispute the dissent's assertion that the ban could not withstand

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14. *Roe*'s holding that a woman is entitled to an abortion even after viability when necessary to preserve her life or health, 410 U.S. at 163-164, implies that regulations of pre-viability abortions must not subject women to "significant health risks." *Casey*, 505 U.S. at 880. *Casey* indicates that a law imposes an "undue burden on a woman's abortion right" if it has this effect. *See id.* at 880 (upholding Pennsylvania's medical emergency definition).

heightened scrutiny. *See* 550 U.S. at 171 (Ginsburg, J., dissenting) ("the Court upholds an Act that surely would not survive close scrutiny"). Instead, the Court applied rational-basis review, thereby implicitly rejecting the dissent's contention that its precedents – including *Casey* — required "close scrutiny" of "state-decreed limitations on a woman's reproductive choices." 550 U.S. at 171 (Ginsburg, J., dissenting). Without requiring the government to provide confirming evidence, the *Gonzales* Court accepted as "reasonable" Congress's finding that "partial-birth abortion, more than standard D & E, 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'" 550 U.S. at 160 (citation omitted).

Gonzales also concluded that the Act furthered another important governmental purpose. Recognizing that many women come to regret their abortions, that women often are not told the details of late-term abortion procedures, and that a woman would experience "sorrow more profound" upon learning that she had "allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child," this Court found it "a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions." 550 U.S. at 159-160. Under petitioners' heightened-scrutiny version of the purpose prong, every step in this Court's chain of common-sense reasoning would have been rejected as speculative or overbroad,[15] and the contrary conclusion of the *Gonzales*

15. *See* 550 U.S. at 182-185 (Ginsburg, J., dissenting) (critiquing the Court's reasoning).

dissenters – that "the Act scarcely furthers that interest," 550 U.S. at 181 (Ginsburg, J., dissenting) — would have prevailed.

The federal ban on partial-birth abortions was also challenged on the ground that it did not permit "use of the barred procedure where 'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother." *Gonzales*, 550 U.S. at 161 (citations omitted). Under *Casey*, this prohibition would have constituted an undue burden if it had the effect of subjecting women to "significant health risks." *See Casey*, 505 U.S. at 880. The *Gonzales* Court determined that whether the Act had that effect remained "a contested factual question: The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position." 550 U.S. at 161. Relying on the Court's precedents "giv[ing] state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," the Court ruled that the statute should be upheld against facial challenge "when this medical uncertainty persists." *Id.* at 163. Of particular importance here, the Court squarely held that "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.* at 164.

III. When The Purpose And Effect Prongs Are Properly Defined And Applied, The Ambulatory Surgical Center Requirement Is Constitutional[16]

A. The ASC Requirement Satisfies The Purpose Prong Because It Is Rationally Related To The Valid State Interest In Reducing The Health Risks Of Abortions

Under *Gonzales*, the purpose prong involves a limited and deferential inquiry into whether an abortion "regulation is rational and in pursuit of legitimate ends." 550 U.S. at 164. In applying the purpose prong, the question the District Court should have asked in this facial challenge is whether the legislature had a rational basis for concluding that the ASC requirement would further enhance the safety of early abortions. The answer to that question is readily apparent. The Texas legislature's express goal was to improve the health and safety of abortion patients. Resp. Br. 31. It drew guidance from Pennsylvania's adoption of the Gosnell grand jury's recommendation to hold abortion facilities to the standards of ASCs, *id.* at 2, while also hearing medical testimony attesting to the ASC requirement's health benefits. *Id.* at 34. Its judgment that an ASC requirement would advance the valid goal of enhancing patient health and safety was unquestionably rational.

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16. An analysis parallel to the one presented in this Part would show that HB2's admitting-privileges requirement is also constitutional on its face, but is omitted because petitioners' facial challenge to that provision is barred by res judicata. *See* Resp. Br. 17-18.

Disregarding the legislature's reasonable grounds for imposing the ASC requirement, the District Court held that it failed the purpose prong because "the intent of the State [was] to reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle for a woman seeking to access an abortion." Pet. App. 148a. That holding was critically dependent on the District Court's conclusion that there was a "dearth of credible evidence" showing better health outcomes for abortions performed in ASCs. *Id.* Yet the District Court arrived at that conclusion having already acknowledged that ASCs *do* lower abortion risks to some extent. *See* Pet. App. 146a ("risks are not *appreciably* lowered" at ASCs) (emphasis supplied). Under rational basis review, that more than sufficed to satisfy the purpose prong: the legislature's belief that ASCs would improve health outcomes was not just reasonable, it was to some extent *correct*.[17]

Beyond that, *Gonzales* directs reviewing courts, when applying the undue burden standard, to defer to the legislature's judgment about "the balance of risks" in the face of genuine "medical uncertainty," 550 U.S. at 166, rather than resolving that uncertainty through de novo review of conflicting evidence and testimony. The District Court ignored that directive. Both before the legislature and at trial, qualified medical experts testified that the

17. The District Court also erred in drawing an adverse inference from evidence that the ASC requirement's health benefits would be counteracted by additional health risks attributable to "increased delays in seeking early abortion care." Pet. App. 146a. If a law can reasonably be predicted to have effects that *do* advance its declared purpose, that suffices to establish "a rational basis," *Gonzales*, 550 U.S. at 158, even if unintended consequences might undermine them.

ASC requirement would confer significant health benefits by reducing the incidence of abortion complications and improving the quality of care when complications occur. Resp. Br. 26-28, 32-34. Petitioners own experts vigorously disagreed (although one of them acknowledged that some health-care providers "believe requiring a clinic to be an ASC benefits the health and safety of a woman choosing to undergo an abortion.") J.A. 528. But unless *Gonzales*' holding is to be nullified, "medical uncertainty" cannot be confined to cases in which a trial judge concludes the evidence is in equipoise. By substituting its judgment, the District Court erroneously left "no margin of error for [the] legislature[] to act in the face of medical uncertainty." *Gonzales*, 550 U.S. at 166.

B. The ASC Requirement Satisifies The Effect Prong Because It Does Not Create A Substantial Obstacle To Obtaining Abortions For A Large Fraction Of Texas Women

Under the effect prong, the question the District Court should have asked in this facial challenge is whether the ASC requirement imposed a "substantial obstacle" to women's ability to obtain elective abortions in Texas. Again the answer is apparent. The ASC requirement forecloses one option all women in Texas previously had – having an abortion in a non-ASC clinic – and also reduces (at least in the short run) the total number of abortion clinics in the state. These effects will make it somewhat more difficult and expensive for women to obtain abortions, but they fall far short of the severe obstacles this Court's decisions have invalidated under the undue burden standard. *See Casey*, 505 U.S. at 893-894 (invalidating a spousal notification provision because it would deter a "significant number

of women" from obtaining abortions "as surely" as if the state "had outlawed abortion in all cases"); *Stenberg*, 530 U.S. at 946 (invalidating a state ban on the infrequently used partial-birth abortion method after determining that it also outlawed "the most commonly used method" used in second trimester abortions).

Instead, the District Court mistakenly imported balancing into the effect prong, concluding that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." Pet. App. 145a. With regard to the ASC requirement, it found "no particularized health risks" from abortions in non-ASC clinics that would "countenance the imposition of the ambulatory-surgical-center requirement on the provision of all abortions." Pet. App. 146a. Because its undue-burden ruling was dependent on its use of balancing, the District Court's invalidation of the ASC requirement was legally erroneous.

In addition, after finding that HB2's requirements would cause many clinics to close, the District Court concluded that "[e]ven if the remaining clinics could meet the demand, the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." Pet. App. 141a. This statement is virtually self-refuting: if the remaining clinics can meet the demand, no woman would be *foreclosed* from obtaining an abortion, even if she faced appreciable delay or inconvenience fairly attributable to the ASC requirement. As such, the District Court's ruling conflicts with this Court's approval of the 24-hour waiting period in *Casey*, which caused similar practical problems

for some women, but which this Court found did not create a "substantial obstacle." 505 U.S. at 887.[18]

IV. If This Court Reexamines The Undue Burden Standard, It Should Decline To Adopt Heightened Scrutiny Or Balancing, And Should Instead Rule That Only Obstacles that Can Fairly Be Characterized as Severe Impediments To Obtaining Abortions Should Be Deemed to Constitute "Substantial Obstacles."

To uphold HB2, this Court need only apply the undue burden standard as laid down and utilized in its controlling precedents. If, however, this Court elects to reexamine the undue burden standard, it should refuse to transform the purpose or effect inquiries along the lines petitioners envision. It is entirely fitting that the purpose prong calls for rational-basis review of whether an abortion regulation is reasonably related to a valid state interest. Most social and economic legislation would fail strict scrutiny – not because it is harmful, but because it is not *demonstrably* beneficial overall. Laws regulating health-care providers, including abortion providers, are no different in this regard. Abortion regulations *are* different from ordinary legislation, however, because the effect prong forbids them to create a substantial obstacle to women's access to abortion. Abortion regulations that comply with the effect prong, by definition, do not actually impose "a substantial obstacle": the only question is whether their purpose is

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18. Beyond that, petitioners failed to prove how many clinics, if any, will permanently close (rather than relocating or entering into arrangements with existing ASCs) as a result of the ASC requirement. *See* Brief Amici Curiae of University Faculty for Life et al. 15-18.

to do so. In *Mazurek*, this Court expressed doubt about whether such a purpose could violate the undue burden standard in the absence of significant burdensome effects. *See* 520 U.S. at 972. However that question should be resolved, heightened scrutiny is plainly unwarranted when a regulation *satisfies* the effect prong. This is not to say that reviewing courts should exclude *a priori* the possibility that a statute's declared purpose is pretextual. *Cf. Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (when "applying rational-basis review under the Public Use Clause," "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose"). But challengers should bear the heavy burden of overcoming the rational-basis presumption that the legitimate reasons deducible from a regulation's terms and design motivated its enactment.

Nor can a persuasive case be made for disregarding precedent and transforming the effect prong by adopting an open-ended balancing test. As this case illustrates, in the context of maternal-health regulations a balancing test empowers every trial court to substitute its value judgments for the perfectly reasonable ones enacted into law by the people's representatives. In the context of regulations designed to protect fetal life, a balancing test would be even worse. Consider, for example, an informed-consent provision such as the one upheld in *Casey*. Any trial judge who is so inclined could decide that the concrete burdens of cost, delay and inconvenience such provisions impose on many women outweigh the unknown (and

unknowable) number of cases in which women will elect to spare the lives of their fetuses because of the informed-consent process – and could do so without even finding that those burdens amounted to a substantial obstacle.[19]

Rather than jettisoning the requirement that an abortion regulation must impose a "substantial obstacle" on abortion rights, this Court should clarify it by holding that only obstacles that can fairly be characterized as *severe* impediments to obtaining abortions should be deemed "substantial" under the effect prong. It is no accident that the only challenged regulation the *Casey* opinion found to "impose a substantial obstacle" was deemed "likely to deter[]" women from obtaining abortions "as surely as if the Commonwealth had outlawed abortion in all cases." 505 U.S. at 894.

In particular, a regulation designed to protect maternal health or fetal life should not be deemed to impose an undue burden unless it causes a severe increase in the expense or difficulty of obtaining abortions. Indeed, in the case of fetal-protective regulations, that understanding of what constitutes a "substantial obstacle" is required by fidelity to the underlying balance of interests at stake. As

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19. In an attempt to make balancing appear indispensable, petitioners argue that, absent balancing, a vitally necessary health regulation that would require closing a state's only abortion clinic would have to be struck down as an undue burden. Pet. Br. at 47-48. Assuming arguendo that petitioners' premise is correct, there is a better way to avoid the anomaly: to interpret *Casey* as exempting vitally necessary health regulations from the undue burden standard, on the ground that the state's interest in protecting the woman's life and health from serious dangers is sufficiently compelling to override her right to an elective abortion.

a careful reading of the opinions in *Casey* will confirm, a majority of the Justices, including one or more coauthors of the controlling plurality opinion, were of the opinion that — as an original matter and without regard to stare decisis — the state's interest in protecting pre-viable fetal life outweighed the woman's specially protected liberty interest in an elective abortion. *See Casey*, 505 U.S. at 853 ("the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis"). *See also* Stephen G. Gilles, *Why The Right To Elective Abortion Fails* Casey's *Own Interest-Balancing Methodology – and Why It Matters*, 91 Notre Dame L. Rev. 691, 717-720 (2015) (forthcoming), available online at ssrn.com/abstract=2489652 (explaining the interpretive evidence for this reading of *Casey*). Although *Casey* holds that the force of stare decisis nevertheless requires adherence to *Roe*'s "essential holding," 505 U.S. at 846, the undue burden standard is — and should be — structured to reflect the crucial importance of the state's interest in protecting unborn human offspring at every stage of their development. No less is required by *Casey*'s commitment that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential." *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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